(1) 89-808

Supreme Court, U.S.
FILED
OCT 30 1989
JOSEPH F. SPANIOL, JR.
CLERK

No.

In the Supreme Court of the United States

October Term, 1989

EUGENE R. SUTTON
and EDWARD DHAYER, et al.
Petitioners,

v.

NATIONAL INTERGROUP, INC.; a/k/a/ NATIONAL STEEL CORP.; WEIRTON JOINT STUDY COMMITTEE, INC.; INDEPENDENT STEELWORKERS UNION; INDEPENDENT GUARD UNION; and WEIRTON STEEL CORP.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

May appellants in an age discrimination in employment action be denied the right of appeal because they were not specifically named as members of the appealing class in the notice of appeal, despite the holdings of three other courts of appeals that such exact specificity is not necessary?

LIST OF PARTIES

The caption of this case contains only the names of Eugene R. Sutton and Edward Dhayer. Additional Petitioners for the *Sutton* appeal are listed as follows:

ROBERT F. BALDWIN; THOMAS V. BARNHOUSE; WALTER BIRRELL; CAMDEN BUMGARNER; PETER BRIER; JAMES P. BURKETT; HOMER R. CAMERON; MYERS D. CAMPBELL; JOSEPH CANDAL, JR.; NOEL A. CANTIN; RAYMOND CAPARROS; HERBERT A. CHAPMAN; WILLIAM H. CHAPPELL; GLENN L. CHIVERS; JAMES S. CLARK; GLEN V. COTTRILL; FRANK V. CYBULSKI; GEORGE R. DANFORD; DONALD DAVIDSON; CHARLES L. DAWSON; NEIL E. DENNIS; FRANK E. DiPIETRO, SR.; NICHOLAS S. DODERICK; CARL G. DULANEY; WILLIAM H. EASTHAM; ERNEST W. FITHYAN; GEORGE C. FOLDI, SR.; CHARLES W. FRANTZ; RALPH GORRELL, SR.; ROBERT GREGSON; JOHN W. HANEY, JR.; CHARLES M. HAYES; RICHARD A. HIXENBAUGH; JAMES M. HOFFMAN; JAMES A. HOGE; HAROLD G. HUGGINS; HARRY D. JONES; WENDALL JONES; ROY E. KING; JOSEPH W. LIPAN, JR.; EDWARD J. KLAKOS; DANIEL KUKICH; JAMES E. LASLO; RICHARD D. LAW; ROBERT G. LeMASTERS; LEE W. LIBENGOOD; RAYMOND LUDEWIG; JOHN G. McCLASKEY; DANA C. McCLELLAND; JOHN J. McELWAIN; GEORGE F. McLAUGHLIN; HAROLD E. MASTERS; FRANK B. MATEUSIAK; JOHN W. MILEWSKY; JOHN H. MISCH; ALBERT L. MONSEAU; ROY MOOREHEAD; GEORGE T. MURRAY; LOUIS NAGY; STANLEY A. PAULIN, SR.; ALBERT A. PETRELLA; DWAIN E. POLAND; HILBERT W. PYLES; FLOYD C. RABE;

JOE H. RADIVOJ, JR.; RICHARD K. RAINERI; FRANK REA; ODELL RECTOR; ROBERT D. ROBINSON; JAMES E. RYAN; GEORGE E. SAPOS; EDWARD G. SEMBAR; CLARENCE W. SIMS; EDWIN N. SINILA; GEORGE W. SMITH; ROBERT L. STARKEY; GARY M. STRAIGHT; EUGENE A. SWEITZER; ROBERT K. THOMPSON; RICHARD TOKER; HERBERT E. UTZLER; EDWIN R. WEAVER; THOMAS R. WEDLAKE; ARTHUR C. WHARTON; THOMAS J. WIGNER; STANLEY D. WILLEY; RAY J. WILLIAMS; HAROLD E. WILLIS; WILLIAM W. WILLOUGHBY; and THOMAS E. WINLAND

Additional Petitioners for the *Dhayer* appeal are listed as follows:

FRANCIS BAIER; EDWARD BITTNER; HARRY V. BROWN; JAMES H. BROWNING; BERNARD A. DEKU, JR.; ROBERT D. DEKU; RALPH ANTHONY DiBACCO; DOMENIC F. FRIO; DORSEY R. GARRETT; WILLIAM F. GARRISON; LEONARD GREGOR; ROBERT EDWARD GRIFFITH; PATRICK S. GURRERA; ROSEMARIE HARBIN (WIDOW) ON BEHALF OF DAVID R. HARBIN (DIED 10/88); WILLIAM HAMILTON; JAMES W. HAZLETT; JERRY G. JONES; JOSEPH P. KARAS; LLOYD A. KLAGES; CHARLES L. LACEY; CHARLES D. MURRAY; CHARLES PRINCE; LARRY C. RIGGLE; WILLIAM B. RIGGS; JOHN STRINGER; DANIEL TOURNAY; and FREDERICK R. WELSHANS.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
LIST OF PARTIES	ii
TABLE OF CITATIONS	v
OPINIONS BELOW	1
JURISDICTIONAL STATEMENT	2
RULE INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	4
CONCLUSION	9

TABLE OF CITATIONS

CASES

Page

Allen Archery, Inc. v. Precision Shooting Equip., Inc.,
857 F.2d 1176 (7th Cir. 1988) 5, 6

Ford v. Nicks,
866 F.2d 865 (6th Cir. 1989) 5, 7, 8

Mariani-Giron v. Acevedo-Ruiz,
877 F.2d 1114 (1st Cir. 1989) 5, 6

Pope v. Mississippi Real Estate Commission,
872 F.2d 127 (5th Cir. 1989) 5, 6, 7

Shatah v. Shearson/American Express, Inc.
873 F.2d 550 (2d Cir. 1989) 5

Torres v. Oakland Scavenger Co.,
____ U.S. ____, 108 S.Ct. 2405 (1988) 5, 7, 8

STATUTES AND OTHER AUTHORITIES

Age Discrimination in Employment Act,
29 U.S.C. § 621 *et seq.* (1986) 2

Judicial Code,
28 U.S.C. § 1254(1) 2

Fed. R. App. P. 3 2

PETITION FOR A WRIT OF CERTIORARI

To The United States Court of Appeals

FOR THE FOURTH CIRCUIT

Petitioners, Eugene R. Sutton, Edward Dhayer, *et al.*, ("Petitioners") respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on August 2, 1989.

OPINIONS BELOW

The August 2, 1989 Judgment and Opinion of the United States Court of Appeals for the Fourth Circuit ("Fourth Circuit"), is reprinted in Appendix A, hereto at 1a.

The May 22, 1989 Order of the Fourth Circuit is reprinted in Appendix B, hereto at 3a.

The January 4, 1989 Opinion and Order of the United States District Court for the Northern District of West Virginia is reprinted in Appendix C, hereto at 5a.

The August 1, 1986 Notice of Judgment and Opinion of the Fourth Circuit is reprinted in Appendix D, hereto at 11a.

The January 31, 1986 Findings of Fact and Conclusions of Law of the United States District Court for the Northern District of West Virginia is reprinted in Appendix E, hereto at 19a.

The January 31, 1986 Stipulation and Order of the United States District Court for the Northern District of West Virginia is reprinted in Appendix F, hereto at 33a.

JURISDICTIONAL STATEMENT

The Fourth Circuit entered its judgment on August 2, 1989. Its decision, based on its May 22, 1989 Order, is in conflict with decisions of at least three other United States Courts of Appeals concerning the standard to which an appellant must be held in a Notice of Appeal under Fed. R. App. P. 3(c). This Court has jurisdiction to review the judgment pursuant to 28 U.S.C. § 1254(1).

RULE INVOLVED

Federal Rule of Appellate Procedure 3 provides, in relevant part:

> (c) **Content of the Notice of Appeal.** The Notice of appeal **shall specify the party or parties** taking the appeal; shall designate the judgment, order or part thereof appealed from; and shall name the court to which the appeal is taken. Form 1 in the Appendix of Forms is a suggested form of a notice of appeal. *An appeal shall not be dismissed for informality of form or title of the notice of appeal.*

Fed. R. App. P. 3(c) (emphasis added).

STATEMENT OF THE CASE

This case involves two groups of individuals who allege that National Intergroup, Inc. and others (collectively "National") violated the Age Discrimination In Employment Act (the "ADEA"), 29 U.S.C. § 621 *et seq.*, in that certain terms and conditions of the sale by National Steel of the assets of the Weirton Division to the Weirton Steel Corporation adversely affected older workers.

On January 31, 1986, the United States District Court for the Northern District of West Virginia dismissed the

Sutton Complaint (Civil Action No. 84-74-W) as against all the plaintiffs except Eugene R. Sutton ("Sutton"), and as to Sutton, dismissed Counts III and IV. By stipulation, the District Court's Order was deemed applicable to the Dhayer Complaint (Civil Action No. 84-100-W) and that Complaint was dismissed as to all the plaintiffs except Edward Dhayer. In making this determination, the District Court held that the single-filing rule was inapplicable to ADEA actions and that Sutton and Dhayer could not file a charge with the Equal Employment Opportunity Commission (the "EEOC") on behalf of all other similarly situated individuals.

On March 5, 1986, the Sutton and Dhayer plaintiffs appealed to the Fourth Circuit. On August 1, 1986, the Court of Appeals dismissed the Sutton and Dhayer appeal on the grounds that the January 31, 1986 Order of Court had not been certified pursuant to Rule 54(b). On October 26, 1986, the Sutton and Dhayer plaintiffs filed a motion with the Distict Court requesting that the Court certify its Order of January 31, 1986. On January 4, 1989, Robert E. Maxwell, United States District Judge for the Northern District of West Virginia granted the Sutton and Dhayer plaintiffs' Motion for Entry of Final Judgment under Rule 54(b).

After the issuance of the January 4, 1989 Order, the Sutton and Dhayer plaintiffs filed a timely joint appeal to the United States Court of Appeals for the Fourth Circuit on January 31, 1989 requesting review of the District Court's Order of January 31, 1986 finding that the single filing rule is inapplicable to ADEA actions. The Respondents herein filed a Motion to Dismiss the above-referenced appeals on March 16, 1989 to which the Sutton and Dhayer plaintiffs replied on April 7, 1989.

The Motion to Dismiss was based on failure to specifically name, in the Notice of Appeal, all the Sutton and Dhayer plaintiffs. The Notice of Appeal read Eugene R. Sutton, *et al.*, and Edward Dhayer, *et al.* The Motion to Dismiss was granted even though the Notice internally specified that the appeal was taken by "all plaintiffs" affected by the Court's January 4, 1989 Order, and such Order was attached to the Notice of Appeal. Further, the Notice of Appeal indicated that "149 plaintiffs" were involved in the lower action.[1] *See* Notice of Appeal, attached hereto as Appendix G.

Upon consideration of the Motion to Dismiss and the response in opposition to the Motion, a three-judge panel of the Fourth Circuit issued an Order dismissing the appeals. Chief Judge Ervin dismissed the appeal. Judge Wilkinson concurred with this result and Judge Hall dissented. There was no decision filed in support of the Order.

In June of 1989, a Petition for Rehearing En Banc was filed with the Fourth Circuit and on August 2, 1989, this Petition was denied by a six to five decision.

REASONS FOR GRANTING THE WRIT

The Petitioners in this case were held to a standard that the utilization of the term *et al.* in a caption of a Notice of Appeal is insufficient, regardless of any other designation or specification that may be contained in the body of the Notice.

The Fourth Circuit's interpretation of the use of *et al.* on the face of a Notice of Appeal conflicts with that of at

[1]Although the current action is only being brought by 119 of the Sutton and Dhayer plaintiffs, at the time of the filing of the Notice of Appeal, all of the 149 individuals adversely affected by the District Court's January 31, 1986 ruling appealed.

least three other courts of appeals.[2] This Court should issue a Writ of Certiorari because this conflict concerns an issue of law which is critically important to the preservation of parties' access to the courts. This issue is, simply, where a Notice of Appeal does not specifically name each of the parties involved, should that Notice be deemed to be insufficient or is the construction by this Court of Fed. R. App. P. 3(c) in *Torres v. Oakland Scavenger Co.*, ____ U.S. ____, 108 S.Ct. 2405 (1988) expansive enough to permit substance to rise over form.

In adopting the interpretation it did, the Fourth Circuit's decision in this case ignores the guiding reasoning of this Court's decision in *Torres*. In *Torres*, this Honorable Court stated that Torres would be barred from appeal because, "[h]e was never named or otherwise designated, however inartfully, in the notice of appeal . . . " ____ U.S. ____, 108 S. Ct. at 2409.

Certiorari should be granted in this case to correct the conflict which has arisen between the Fourth Circuit and the other courts of appeals who have interpreted the above referenced language in *Torres* to require less specificity than the actual naming of the appellants. Unlike the Fourth Circuit, these courts of appeals have held that an individual need not specifically name all of the appellants

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[2]The split in the circuits is evidenced by the fact that the First, Fifth and Sixth Circuits have adhered to a less stringent reading of *Torres v. Oakland Scavenger Co.*, ____ U.S. ____, 108 S.Ct. 2405 (1988). *See Mariani-Giron v. Acevedo-Ruiz*, 877 F.2d 1114 (1st Cir. 1989); *Pope v. Mississippi Real Estate Commission*, 872 F.2d 127 (5th Cir. 1989) and *Ford v. Nicks*, 866 F.2d 865 (6th Cir. 1989). The Fourth, Second and Seventh Circuits adhere to a very strict standard. *See Shatah v. Shearson/American Express*, 873 F.2d 550 (2d Cir. 1989) and *Allen Archery Inc. v. Precision Shooting Equip., Inc.* 857 F.2d 1176 (7th Cir. 1988).

in a Notice of Appeal, but only must specify the parties taking the appeal.

In *Mariani-Giron v. Acevedo-Ruiz,* 877 F.2d 1114 (1st Cir. 1989), the Court of Appeals for the First Circuit indicated that a court of appeals lacks power to entertain an appeal from a party who is not specified in the Notice of Appeal. 877 F.2d at 1115. The court further stated that regarding the lack of specificity upon which the defendant moved to dismiss, that the presence of a name in the caption coupled with the statement in the body of the Notice of Appeal that "defendants hereby appeal" satisfied the specificity requirements of Rule 3(c). In making this decision, the First Circuit noted as follows:

> [W]e cannot say that Acevedo Ruiz 'was never named or otherwise designated, however inartfully, in the notice of appeal' even though the 'ET AL' and the plural use of 'defendants' left us in doubt as to the remaining defendants seeking to appeal.

877 F.2d at 1116.

The First Circuit expressly disagreed with the Seventh Circuit's holding in *Allen Archery, Inc. v. Precision Shooting Equip., Inc.,* 857 F.2d 1176 (7th Cir. 1988) where the Seventh Circuit imposed a specific naming requirement upon appellants in filing a procedurally valid Notice of Appeal. 877 F.2d at 1116.

So too, the United States Court of Appeals for the Fifth Circuit in *Pope v. Mississippi Real Estate Commission,* 872 F.2d 127 (5th Cir. 1989) ruled that the failure to name a party in the caption of the Notice of Appeal did not bar the addition of Pope's wife to the appeal, even though the infamous words "et al." appeared in the caption. In

permitting this addition, the court noted the flexible aspect of *Torres* by stating,

> In *Torres,* the phrase 'et al.', which translates literally to 'and others', could have referred to a large class of unnamed individuals, as well as, or instead of, Torres. There are only two plaintiffs in this case, James and Mary Pope. The Popes' notice of appeal named 'James William Pope, et al.' It also stated that 'Plaintiffs do hereby appeal'. 'Plaintiffs' can include only James and Mary Pope, and the 'et al.' can mean only Mary Pope. Therefore, in the limited context of this two-party action, we distinguish *Torres.*

872 F.2d at 129. Again, precise naming was not required.

In perhaps the most illustrative case of a court of appeals permitting flexibility in terms of lack of exact precision in pleading, the Sixth Circuit in *Ford v. Nicks,* 866 F.2d 865 (6th Cir. 1989) stated as follows:

> In the case at bar, as it happens, the ambiguities inherent in the caption can be cleared up by reference to the body of the notice. English, unlike Latin, does have articles and the body of the notice filed on behalf of Chancellor Nicks et al. says that the appeal is being taken by 'the' defendants.
>
> * * *
>
> In the *Torres* case, by contrast, the body of the notice of appeal listed the names of 15 out of 16 plaintiffs as parties to the appeal. The name of the sixteenth plaintiff, Jose Torres had been omitted through a clerical error.
>
> * * *

> We think it would be manifestly improper for us to read the words 'the defendants', in the body of the instant notice as meaning Chancellor Roy S. Nicks only. The other defendants may have been designated somewhat 'inartfully', to borrow the adverb used in *Torres*, but to say that they were not designated at all would be untrue.

866 F.2d at 869-70.

In the instant case, in the Notice of Appeal the Petitioners in this action specifically made reference to and attached to the Notice the Judgment of the District Court. Further, in their Notice of Appeal, the Petitioners also specifically stated that those individuals affected by that judgment were those appealing. However "inartful" this designation is, it would have been sufficient under the standard adhered to in the First, Fifth and Sixth Circuit.

Clearly there is a schism amongst the Courts of Appeals. Because the Fourth Circuit *and* the circuits holding inapposite to the Fourth Circuit all rely on this Court's decision in *Torres*, the Petitioners respectfully request that this Court issue a Writ of Certiorari to clarify what standard must be met under the *Torres* interpretation of Fed. R. App. P. 3(c). This clarification is necessary in order that federal law be evenly applied to individuals seeking redress in the courts, regardless of geographic location.

CONCLUSION

In order to resolve the conflict between the Fourth Circuit and the other Courts of Appeals, and for all the other foregoing reasons, it is respectfully submitted that a Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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(412) 338-1100
Counsel of Record
for Petitioners

Appendix A

United States Court of Appeals

FOR THE FOURTH CIRCUIT

No. 89-3213

EUGENE R. SUTTON, *et al.*,

Plaintiff-Appellant,

v.

NATIONAL INTERGROUP, INC., FORMERLY KNOWN AS NATIONAL STEEL CORPORATION,

Defendant-Appellee,

and

WEIRTON JOINT STUDY COMMITTEE, INC.; INDEPENDENT STEELWORKERS UNION; INDEPENDENT GUARD UNION; WEIRTON STEEL CORPORATION,

Defendants.

No. 89-3214

EDWARD DHAYER, *et al.*,

Plaintiff-Appellant,

v.

NATIONAL INTERGROUP, INC.,
FORMERLY KNOWN AS NATIONAL
STEEL CORPORATION,

Defendant-Appellee,

and

WEIRTON JOINT STUDY COMMITTEE,
INC.; WEIRTON STEEL CORPORATION,

Defendants.

On Petition for Rehearing In Banc

The appellants' petition for rehearing in banc, was submitted to the Court. In a requested poll of the Court, Judges Winter, Hall, Phillips, Murnaghan, and Sprouse voted to rehear the case in banc; and Judges Russell, Widener, Chapman, Wilkinson, Wilkins and Chief Judge Ervin voted against rehearing the case in banc. As a majority of the judges voted to deny rehearing in banc, and

As the panel considered the petition for rehearing in banc and is of the opinion that it should be denied,

IT IS ADJUDGED AND ORDERED that the petition for rehearing in banc is denied.

Entered at the direction of Chief Judge Ervin.

FOR THE COURT:

/s/ JOHN M. GREACEN
Clerk

Appendix B

United States Court of Appeals

FOR THE FOURTH CIRCUIT

No. 89-3213

EUGENE R. SUTTON, *et al.*,

Plaintiffs-Appellants,

v.

NATIONAL INTERGROUP, INC., FORMERLY KNOWN AS NATIONAL STEEL CORPORATION,

Defendant-Appellee,

and

WEIRTON JOINT STUDY COMMITTEE, INC.; INDEPENDENT STEELWORKERS UNION; INDEPENDENT GUARD UNION; WEIRTON STEEL CORPORATION,

Defendants.

No. 89-3214

EDWARD DHAYER, *et al.*,

Plaintiffs-Appellants,

v.

NATIONAL INTERGROUP, INC., FORMERLY KNOWN AS NATIONAL STEEL CORPORATION,

Defendant-Appellee,

and

WEIRTON JOINT STUDY COMMITTEE, INC.; WEIRTON STEEL CORPORATION,

Defendants.

Appeals from the United States District Court for the Northern District of West Virginia, at Wheeling. Robert Earl Maxwell, District Judge.

Upon consideration of appellee's motion to dismiss these appeals, and appellants' responses in opposition to the motion,

IT IS ORDERED that the joint motion is granted, and these appeals are dismissed.

Entered at the direction of Chief Judge Ervin, with the concurrence of Judge Wilkinson. Judge Hall dissents.

BY THE COURT:

/s/ JOHN M. GREACEN

Clerk

Appendix C

IN THE

United States District Court

FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

EUGENE R. SUTTON, *et al.*, *Plaintiffs,* vs. NATIONAL INTERGROUP, INC., *et al.*, *Defendants.*	**Civil Action 84-74-W**
EDWARD DHAYER, *et al.*, *Plaintiffs,* vs. NATIONAL INTERGROUP, INC., *et al.*, *Defendants.*	**Civil Action 84-100-W**

MEMORANDUM OPINION

These cases involve two (2) groups of Plaintiffs who allege that Defendants violated the Age Discrimination In Employment Act (the "ADEA"), 29 U.S.C. §§621, *et seq.*, in that certain terms and conditions of the sale by National Steel of the assets of the Weirton Division to the Weirton Steel Corporation deprived them of pension, severance and other benefits to which they were entitled upon the sale.

On October 30, 1984, this Court held a pretrial conference, at which conference the Court asked counsel for all parties to address certain issues with respect to whether the

Plaintiffs had satisfied the procedural prerequisites to commencement of an action under the ADEA. In response, both parties submitted various briefs, memoranda and affidavits.

On January 31, 1986, this Court dismissed the *Sutton* Complaint (Civil Action No. 84-74-W) as against all Plaintiffs except Eugene Sutton, and as to Mr. Sutton dismissed Counts III and IV. By stipulation, this Court's Order was deemed applicable to the *Dhayer* Complaint (Civil Action No. 84-100-W) and the Complaint was dismissed as to all Plaintiffs except Edward Dhayer. In dismissing all Plaintiffs except Mr. Sutton, this Court held that the "single-filing" rule is inapplicable to ADEA actions and Mr. Sutton could not file a charge on behalf of all other Plaintiffs.

This Court's Opinion and Order of January 31, 1986, did not expressly direct the Entry of Judgment against the Plaintiffs who were dismissed. In addition, this Court did not make the determination that there was no just reason for delay.

However, on March 5, 1986, the *Sutton* and *Dhayer* Plaintiffs appealed to the Court of Appeals for the Fourth Circuit. On August 1, 1986, the Court of Appeals dismissed Plaintiffs' appeals on the grounds that the January 31, 1986 Order of this Court had not been certified pursuant to Rule 54(b). On October 29, 1986, Plaintiffs filed with this Court a Motion requesting that this Court certify its Order of January 31, 1986. A memorandum in support of Plaintiffs' Motion was submitted on March 27, 1987. Each of the Defendants filed memoranda in opposition to Plaintiffs' Motions for Rule 54(b) certification.

Rule 56(b) of the Federal Rules of Civil Procedure states in pertinent part:

> "JUDGMENT UPON MULTIPLE CLAIMS OR INVOLVING MULTIPLE PARTIES. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, crossclaim, or third-party claim or when multiple parties are involved, the Court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. . . "

The *Sutton* case is a multiple party action with over 171 Plaintiffs. On January 31, 1986, this Court dismissed 170 Plaintiffs from the case. Thus, this Court's Order of January 31, 1986 clearly places the dismissed Plaintiffs within the parameters of Rule 54(b).

Whether or not the claims of these Plaintiffs will be certified is "left to the sound discretion of the district court." *Curtiss-Wright Corp. v. General Electric Co.*, 446 U.S. 1,100 S. Ct. 1460, 64 L. Ed. 2d 1 (1980). The district court is the one most likely to be familiar with the case and with any justifiable reasons for delay.

In the present case, this Court's Order of January 31, 1986, resulted in the dismissal of over 98% of the *Sutton* and *Dhayer* Plaintiffs. Only a very small portion of the original case remains. Moreover, these Plaintiffs were dismissed because this Court determined that the procedural requirements prerequisite to commencement of an ADEA action were not met. As such, if any immediate appeal is taken by these dismissed Plaintiffs, there is no danger that an appellate court would have to decide the same issue

more than once even if these were subsequent appeals by Messrs. Sutton and Dhayer.

In *Curtiss-Wright Corp. v. General Electric Co., supra,* the United States Supreme Court stated that an important consideration in a Rule 54(b) analysis whether the nature of the claims already determined is such that no appellate court would have to decide the same issue more than once in subsequent appeals.

In addition, it is this Court's belief that certification of these claims makes "judicial sense." If an immediate appeal is not allowed by this Court, then the issue of whether Plaintiffs complied with the procedural prerequisites will reach the Court of Appeals after the trials of Mr. Sutton and Mr. Dhayer. If the appellate court then rules that this Court improperly dismissed all Plaintiffs except Mr. Sutton and Mr. Dhayer, this Court will be faced with conducting a second trial involving the same issues and an identical presentation of evidence by both Plaintiffs and Defendants.

It is this Court's opinion that certification of its January 31, 1986 Order will avoid a situation that may spawn two trials of the exact same issues. In addition, there is no possibility of repetitive appellate review of the same issues.

Accordingly, this Court concludes that there is no just reasons to delay appeal of the January 31, 1986 Order dismissing the claims of all Plaintiffs except Mr. Sutton and Mr. Dhayer. The Plaintiffs' Motion for Entry of Final Judgment under Rule 54(b) will be granted.

January 4, 1989

/s/ ROBERT E. MAXWELL
United States District Judge

IN THE

United States District Court

FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

EUGENE R. SUTTON, *et al.*, *Plaintiffs,* vs. NATIONAL INTERGROUP, INC., *et al.*, *Defendants.*	**Civil Action 84-74-W**
EDWARD DHAYER, *et al.*, *Plaintiffs,* vs. NATIONAL INTERGROUP, INC., *et al.*, *Defendants.*	**Civil Action 84-100-W**

ORDER DIRECTING ENTRY OF FINAL JUDGMENT AS TO CERTAIN PLAINTIFFS AND CLAIMS AND DETERMINATION THAT NO JUST CAUSE EXISTS FOR DELAY PURSUANT TO RULE 54(b) OF THE FEDERAL RULES OF CIVIL PROCEDURE

Plaintiffs, Eugene R. Sutton, et al., and Edward Dhayer, et al., have filed a Motion Requesting Entry of Final Judgment as to certain Plaintiffs and claims adjudicated in the prior Order of this Court entered January 31, 1986 and filed February 4, 1986, and a determination that there is no just cause for delay in entering final judgment with respect to the Plaintiffs and claims adjudicated pursuant to Rule 54(b) of the Federal Rules of Civil Procedure.

Upon consideration of the Motion of Plaintiffs, it is expressly determined that there is no just cause to delay the Entry of Final Judgment as to the Plaintiffs and claims adjudicted in the Order of January 31, 1986 and it is

ORDERED that final judgment be and hereby is entered.

Entered: January 4, 1989 /s/ ROBERT E. MAXWELL
United States District Judge

Appendix D

United States Court of Appeals

FOR THE FOURTH CIRCUIT

August 1, 1986

TO: Shelley W. Elovitz, Esq.
Carl H. Hellerstedt, Jr., Esq.
Carl N. Frankovitch, Esq.
Anthony F. Phillips, Esq.

NOTICE OF JUDGMENT

Judgment was entered in Case Nos. 86-2024, 86-2025 this date.

The Court's opinion is enclosed.

PETITION FOR REHEARING (FRAP 40)

Filing Time A petition must be *received in the Clerk's Office* within 14 days after the judgment date set forth above. *No extension will be granted save for the most compelling reasons.* Requests based on grounds such as miscalculation of time or a need to consult with others will be peremptorily denied.

Purpose A petition should only be made to direct the Court's attention to one or more of the following situations:

1. A material fact or law overlooked in the decision.

2. A change in the law which occurred after the case was submitted and which was overlooked by the panel.

3. An apparent conflict with another decision of the Court which is not addressed in the opinion.

Statement of Counsel *A petition shall contain an introduction stating that, in counsel's judgment, one or more of the situations exist as described in the above "Purpose" section. The points to be raised shall be succinctly listed in the statement. Lacking such a statement, the petition will be returned to counsel without filing.*

Form The 15 page limit allowed by the Rule shall be observed. The Court requires 15 copies of the petition; however, a pro se party who is indigent may file the original only.

BILL OF COSTS (FRAP 39)

Filing Time A party to whom costs are allowed, who desires taxation of costs, shall file a bill of costs within 14 days after judgment.

MANDATE (FRAP 41)

Issuance Time The mandate is issued 21 days after judgment. A *timely* petition for rehearing will stay the issuance. If the petition is denied, the mandate will issue 7 days later. If a stay of mandate is sought, only the original of a motion need be filed.

Stay A motion for stay of the issuance of the mandate shall not be granted simply upon request. Ordinarily the motion will be denied unless it would not be frivolous or filed merely for delay and would present a substantial question or otherwise set forth good or probable cause for a stay.

JOHN M. GREACEN
CLERK

UNPUBLISHED

United States Court of Appeals

FOR THE FOURTH CIRCUIT

No. 86-2024 (L)

EUGENE R. SUTTON, PAUL D. ALEXANDER, ANTHONY J. ANGELO, CHARLES W. BAIER, ROBERT F. BALDWIN, JOHN P. BARLAS, THOMAS V. BARNHOUSE, WILLIAM BELL, WALTER BIRRELL, PETER BRIER, CAMDEN BUMGARNER, WILLIAM D. BURCH, JAMES P. BURKETT, ADRIAN K. BURNWORTH, MYERS D. CAMPBELL, HOMER R. CAMERON, JOSEPH CANDAL, JR., NOEL A. CANTIN, RAYMOND CAPARROS, JAMES W. CARDUCCI, HERBERT A. CHAPMAN, WILLIAM H. CHAPPELL, ANDREW CHICOVIC, JR., GLENN L. CHIVERS, JAMES S. CLARK, HENRY H. COOPER, VONLIE COOPER, GLEN V. COTTRILL, FRANK V. CYBULSKI, GEORGE R. DANFORD, DONALD DAVIDSON, RONALD E. DAVIS, CHARLES L. DAWSON, CARL G. DULANEY, GERALD D. DENNIS, RICHARD W. DENEEN, NEIL E. DENNIS, FRANK E. DIPIETRO, SR., NICHOLAS S. DEDERICK, WILLIAM H. EASTHAM, MERLE H. ETHERIDGE, RUSSELL EVANS, CECIL E. FAULK, WALTER FISHER, ERNEST W. FITHYAN, GEORGE C. FOLDI, SR., CHARLES W. FRANTZ, PAUL A. GERARD, SYDNEY E. GIVENS, RALPH GORRELL, SR., ROBERT GREGSON, ROBERT W. HAMILTON, JOHN W. HANEY, JR., ROBERT F. HANEY,

CHARLES M. HAYES, JAMES E. HELTON, RICHARD A. HIXENBAUGH, JAMES M. HOFFMAN, JAMES H. HOGE, WILLIAM J. HOUSER, HAROLD C. HUGGINS, JOSEPH G. IZZI, HARRY D. JONES, WENDALL JONES, WILLIAM O. JONES, HOWARD D. KEENAN, ROY E. KING, EDWARD J. KLAKOS, MELVIN KOSTUR, STANLEY KRUPINSKI, DANIEL KUKICH, JAMES E. LASLO, CHARLES W. LATIMER, RICHARD D. LAW, ROBERT G. LEMASTERS, JAMES L. LESKO, LEE W. LIBENGOOD, JOSEPH W. KIPAN, JR., GILBERT LITTLETON, JAMES M. LIVINGSTON, JR., RAYMOND LUDEWIG, JOHN G. MCCLASKEY, DANA C. MCCLELLAND, BENNY MCCLOSKY, CHARLES R. MCCONNELL, JOHN J. MCELWAIN, HAROLD C. MCFADDEN, WILLIAM J. MCHUGH, GEORGE F. MCLAUGHLIN, HAROLD E. MASTERS, FRANK B. MATEUSIAK, BYRON L. MESSER, CHARLES E. METZ, JOHN W. MILEWSKY, JOHN H. MISCH, STEVEN A. MODRANSKI, JR., FRED R. MOORE, ROY MOREHEAD, HERBERT D. MORRIS, GEORGE T. MURRAY, LOUIS NAGY, SANDINO Q. ORSINI, JOSEPH A. PASQUARELLA, STANLEY A. PAULIN, SR., ANTOHNY J. PELLEGRINO, ALBERT A. PETRELLA, DWAIN E. POLAND, ELWOOD L. POPISH, PAUL E. PUGH, HILBERT W. PYLES, FLOYD C. RABE, JOE H. RADIVOJ, JR., RICHARD K. RAINERI, JOHN P. RALSTON, LAWRENCE A. RAWSON, FRANK (FRANCIS) REA, RECTOR ODELL, SAMUEL E. RICHARDS, ROBERT D. ROBINSON, CLEMENS ROCCHIO, JAMES E. RYAN, GEORGE E. SAPOS, EDWARD G. SEMBAR, CLARENCE W. SIMS, EDWIN N. SINILA, DALE SMITH, DONALD W. SMITH, GEORGE W.

SMITH, JACK H. SMITH, ROBERT L. STARKEY, DOYLE STEWART, ROBERT E. STILL, GARY M. STRAIGHT, FLOYD D. SWAIN, EUGENE A. SWEITZER, ROBERT K. THOMPSON, RICHARD TOKER, CHARLES M. TORTIS, HERBERT L. UTZLER, EDWIN R. WEAVER, THOMAS R. WEDLAKE, ARDEN R. WESTFALL, ARTHUR C. WHARTON, THOMAS J. WIGNER, STANLEY D. WILLEY, RAY J. WILLIAMS, HAROLD E. WILLIS, WILLIAM W. WILLOUGHBY, AND THOMAS E. WINLAND,

Appellants,

versus

NATIONAL INTERGROUP, INC., A/K/A NATIONAL STEEL CORPORATION; WEIRTON JOINT STUDY COMMITTEE, INC.; INDEPENDENT STEELWORKERS UNION; INDEPENDENT GUARD UNION; AND WEIRTON STEEL CORPORATION,

Appellees.

86-2025

EDWARD DHAYER, FRANCIS BAIER, EDWARD BITINER, HARRY V. BROWN, JR., JAMES H. BROWNING, JAMES WILLIAM BULLOCK, BERNARD A. DEKU, JR., ROBERT D. DEKU, DANIEL T. DIAMOND, RALPH ANTHONY DIBACCO, JOSEPH M. DUMBOVICH, WILLIAM R. DUNCAN, JR., ARTHUR E. FERNANDEZ, DOMENIC F. FRIO, DORSEY R. GARRETT, WILLIAM F. GARRISON, ROBERT EDWARD GRIFFITH, DAVID F. GRIMM, PATRICK S. GUUERA, DAVID R. HARBIN, JAMES W.

HAZLETT, ROBERT E. HESS, JERRY G. JONES, ROBERT L. JONES, JOSEPH P. KARAS, LLOYD A. KLAGES, CHARLES L. LACEY, BRUCE K. LEMASTER, ERNEST H. MCCORNICK, ALBERT L. MONSEAU, CHARLES D. MURRAY, JOSEPH PETRELLE, CHARLES PRINCE, ENNION RASICCI, LARRY C. RIGGLE, WILLIAM B. RIGGS, KENNETH M. SEIPLE, JOHN R. SELMON, JR., CHARLES E. WAGNER, FREDERICK R. WELSHANS, ARTHUR DALE WHITE, DONALD L. WHITE, JOHN E. WOJCIK,

Appellants,

versus

NATIONAL INTERGROUP, INC., A/K/A NATIONAL STEEL CORPORATION; WEIRTON JOINT STUDY COMMITTEE, INC.; AND WEIRTON STEEL CORPORATION,

Appellees.

Appeals from the United States District Court for the Northern District of West Virginia, at Wheeling. Robert E. Maxwell, District Judge. (C/A 84-0074; C/A 84-0100)

Submitted: May 30, 1986 Decided: August 1, 1986

Before HALL, ERVIN, and WILKINSON, Circuit Judges.

(Shelley W. Elovitz for Appellant. Carl H. Hellerstedt, Jr.; Carl N. Frankovitch, VOLK, ROBERTSON, FRANKOVITCH, ANETAKIS & HELLERSTEDT; Anthony F. Phillips, WILLKIE, FARR & GALLAGHER, for Appellees.)

PER CURIAM:

Before us is defendant-appellees' motion to dismiss these appeals of orders in two cases brought pursuant to the Age Discrimination in Employment Act, 29 U.S.C. §§ 621 *et seq.* The orders appealed from do not dispose of all of the claims or all of the parties within the meaning of Fed.R.Civ.P. 54(b). Consequently, the orders are not final within the meaning of 28 U.S.C. § 1291. In the absence of certification by the district court under Fed. R. Civ. P. 54(b), we have no jurisdiction to review the orders. For this reason, we grant the motion and dismiss the appeal. Because the dispositive issue recently has been authoritatively decided, we dispense with oral argument.

DISMISSED.

Appendix E

IN THE

United States District Court

FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

EUGENE R. SUTTON, *et al.*,
Plaintiffs,

vs.

NATIONAL INTERGROUP, INC., *et al.*,
Defendants.

Civil Action No. 84-74W
FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter was heard before the Honorable Robert E. Maxwell on October 29, 1985. Plaintiffs were represented by John R. Spon, Esq. of Spon & Fournier, Steubenville, Ohio and Shelley W. Elovitz, Esq. of Rothman Gordon Foreman and Groudine, Pittsburgh, Pennsylvania. National Intergroup, Inc. ("National") was represented by Carl H. Hellerstedt, Jr., Esq., of Volk, Robertson, Frankovitch, Anetakis and Hellerstedt, Pittsburgh, Pennsylvania. Weirton Steel Corporation ("Weirton Steel") and the Weirton Joint Study Committee (the "JSC) were represented by Anthony F. Phillips, Esq. and Gerald Kerner, Esq. of Willkie Farr & Gallagher, New York, New York. The Independent Steelworkers Union (the "ISU") was represented by Robert J. D'Anniballe, Jr., Esq. of Alpert & D'Anniballe, Weirton, West Virginia. The Equal Employment Opportunity Commission (the "EEOC"), which submitted a brief *amicus curiae*, was represented by Wanda Flowers, Esq. of the EEOC's Philadelphia District Office. The Court reviewed pleadings, affidavits and memoranda

and heard argument of counsel for all parties. Having considered all of the foregoing, and after due deliberation, the Court:

NOW, THEREFORE, makes the following:

FINDINGS OF FACT

I. Introductory Findings

1. This action was commenced by plaintiffs on or about February 3, 1984 in the United States District Court for the Western District of Pennsylvania.

2. Upon motion of defendants and by Order dated July 9, 1984, the United States District Court for the Western District of Pennsylvania transferred this action to this Court pursuant to 28 U.S.C. § 1404(a).

3. Plaintiffs, one hundred and seventy-one in number, allege in their complaint that they are former employees of the Weirton Steel Division (the "Division") of National Steel Corporation ("National Steel"), the assets of which were acquired by Weirton Steel on January 11, 1984, and that they are or were employees of Weirton Steel.

4. Named as defendants in this action are National, Weirton Steel, the JSC and the ISU.

5. Plaintiffs do not assert any claim for relief against the JSC or the ISU.

6. The JSC has been dissolved and no longer exists.

7. Plaintiffs allege that defendants violated the Age Discrimination In Employment Act (the "ADEA"), 29 U.S.C. §§ 621, *et seq.*, in that certain terms and conditions of the sale by National Steel of the assets of the Division to Weirton Steel are alleged to have deprived them of pension

and severance benefits to which they were entitled upon the sale.

8. On October 30, 1984, this Court held a pretrial conference in this action, at which conference the Court asked counsel for all parties to address certain issues with respect to whether the plaintiffs had satisfied the procedural prerequisites to commencement of an action under the ADEA (hereinafter referred to as the "procedural issues"). The parties were permitted to file their submissions and any reply papers until the date of the hearing held on October 29, 1985.

9. On or about January 25, 1985, plaintiffs' counsel submitted a memorandum of law addressing the procedural issues. No affidavit accompanied that memorandum.

10. On or about February 28, 1985, Weirton Steel and the JSC submitted an affidavit of Gerald Kerner, Esq., sworn to February 28, 1985, and a memorandum of law addressing the procedural issues. On or about that same date, National Steel filed alternative motions to dimiss or stay this action for failure to satisfy the procedural prerequisites for commencement of an ADEA action and an accompanying memorandum of law.

11. On or about March 18, 1985, John R. Spon, Esq. and Mr. Bruce Bagin, a supervisor in the EEOC's Pittsburgh Area office, submitted affidavits, sworn to March 15, 1985, addressing the procedural issues. The Bagin affidavit, which had been notarized by Mr. Bagin himself, was replaced by a second Bagin affidavit on or about July 10, 1985. Plaintiffs' attorneys also submitted a reply memorandum of law on or about March 18, 1985.

12. On or about May 30, 1985, Weirton Steel and the JSC submitted a supplemental affidavit of Brian E.

O'Connor, Esq., sworn to May 30, 1985, addressing the procedural issues.

13. On or about August 13, 1985, the EEOC submitted a brief, *amicus curiae,* with respect to the procedural issues.

II. Of The Plaintiffs, Only Sutton Filed A Charge With The EEOC

14. On or about October 6, 1983, Eugene R. Sutton filed two documents, each labelled "Charge of Discrimination", with the EEOC at its Pittsburgh Area Office.

15. One charge named National Steel, Weirton Steel and the JSC as respondents, while the second named the ISU as a respondent. Each was signed only by Sutton. Neither charge identified by name any other employee as a charging party.

16. The charges, which purported to be filed on behalf of Sutton "and all other hourly employees" at the Division, alleged that National Steel, in conjunction with the ISU and the JSC, required as a condition of the sale of the Division, that hourly employees vote to amend National Steel's pension plan to "eliminate" special supplementary pension benefits in violation of the ADEA. Both charges further alleged: "I have been advised that if I opt to retire not only will I be deprived of my rights to supplemental pension and other entitlements of long term employment, but that I am specifically prohibited, by virtue of the agreement of purchase, from any employment with the co-employer/new company, Weirton Steel Corp., for a period of five years."

17. In addition to the claims set forth in the two charges filed by Sutton, the complaint filed by plaintiffs in

this action asserts in Counts III and IV that certain employees were forced to retire and have been refused employment by Weirton Steel. Those allegations were not made in Sutton's EEOC charges.

18. No other charge was filed with the EEOC by any other hourly employee of National Steel or Weirton Steel.

19. Plaintiffs' attorneys contend that on the same date that Sutton filed his charges with the EEOC, plaintiffs' attorneys, John R. Spon, Esq. and Keith A. Fournier, Esq., provided the EEOC with a list of the names of the plaintiffs in the instant action.

20. The list of names which plaintiffs' attorneys contend was provided to the EEOC consists of the caption, apparently excerpted, from a complaint filed in March 1983 by substantially the same plaintiffs, in which action they then alleged that terms of the sales transaction between National Steel and Weirton Steel violated, *inter alia,* the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001, *et seq.,* and federal labor laws. This Court granted defendants partial summary judgment in that action, dismissing the ERISA and labor law claims. *Sutton v. Weirton Steel Division of National Steel Corp.,* 567 F. Supp. 1184 (N.D. W. Va.), *aff'd,* 724 F.2d 406 (4th Cir. 1983), *cert. denied,* 104 S. Ct. 2387 (1984).

21. The list of names which plaintiffs' attorneys contend was provided to the EEOC by Messrs. Spon and Fournier is not dated, does not bear a title, is unsigned, makes no reference to its source and otherwise lacks any identifying feature. Nowhere on the list are the individuals whose names appear thereon identified as parties filing charges with the EEOC.

22. On or about October 13, 1983, the Division received a copy of the Sutton charges from the EEOC. The letter of transmittal from the EEOC to the Division did not identify any hourly employee of the Division other than Sutton as a charging party. Nor did the transmittal letter enclose a copy of the list of names which plaintiffs' attorneys contend was provided to the EEOC by Messrs. Spon and Fournier.

23. On October 21, 1983, counsel for National Steel and counsel for the Division and the JSC met with representatives of the EEOC in Pittsburgh for the purpose of discussing the Sutton charges. At no time during this meeting did the EEOC inform such counsel that any hourly employee other than Sutton had filed a charge with it. Nor at any time during this meeting did the EEOC distribute, display or even mention the list of names plaintiffs' attorneys contend was provided to the EEOC by Messrs. Spon and Fournier.

24. On January 27, 1984, Weirton Steel received a letter from the EEOC advising it that the agency had concluded its conciliation efforts in connection with the Sutton charges and that Sutton was free to file his own suit if he so desired. The EEOC's letter made no reference to any other charging party.

25. On October 10, 1984, National Steel made a Freedom of Information Act ("FOIA") request addressed to the EEOC requesting a copy of the entire contents of the Sutton file. Other than certain exempt investigative material consisting of internal records and memoranda, which the EEOC indicated would not be produced, the EEOC stated that it would otherwise comply with the FOIA request and would produce its Sutton file. Although the EEOC's production included a copy of the two Sutton

charges, the list of names plaintiffs' attorneys contend was provided to the EEOC by Messrs. Spon and Fournier was not produced.

26. Messrs. Spon and Fournier did not obtain authorization from any of the plaintiffs in this action other than Sutton to file a charge with the EEOC. Plaintiffs' attorneys contend that Messrs. Spon and Fournier had authority to provide the EEOC with the list of names they contend they provided to it solely on the basis of their previous representation of these plaintiffs in *Sutton v. Weirton Steel Division of National Steel Corp., supra.*

27. Although Mr. Bagin's second affidavit states that he was provided with a list of names by Messrs. Spon and Fournier, neither Mr. Bagin's first nor second affidavit states that the EEOC viewed the transmittal of that list to it as the filing of a charge by any of the employees whose names appeared on it.

28. *Ultimate Finding:* Even assuming Messrs. Spon and Fournier provided the EEOC with a list of employees' names, such action did not constitute the filing of a charge by any employee whose name appeared on the list other than Sutton because: (a) the list did not identify the employees as charging parties; (b) Messrs. Spon and Fournier had no authority to file charges with the EEOC on behalf of the employees whose names appeared on the list; and (c) the subsequent actions taken by the EEOC in response to the filing of Sutton's two charges were entirely consistent with the filing of charges only by Sutton and not with the filing of charges by any of the other employees whose names appeared on the list.

III. The Documents Styled "Authorization and Consent" Do Not Evidence The Plaintiffs' Consent To Join This Action And Were Obtained At The Request Of Mr. Spon

29. On or about January 25, 1985, plaintiffs' attorneys filed one hundred and nineteen documents each styled "Authorization and Consent" with the Court. Subsequent to the submission of all memoranda and affidavits as requested by the Court, plaintiffs submitted an additional twenty-seven such documents on or about October 11, 1985, most of which documents are undated.

30. Ninety-eight of the initial one hundred and nineteen documents filed with the Court were executed on December 14, 1983 and were notarized by Mr. Spon.

31. Not one of the documents filed with the Court was executed prior to the filing of the Sutton charges.

32. Each document filed with the Court states:

> "I hereby authorize the Equal Employment Opportunity Commission to commence any administrative or judicial action or suit on my behalf, or to join in any administrative or judicial action or suit commenced by my personal attorneys, John Randolph Spon, Jr. and Keith A. Fournier . . . "

33. The ninety-eight documents executed on December 14, 1983 were obtained by Mr. Spon after the law firm of Spon & Fournier requested that the plaintiffs attend a meeting. At that meeting, Mr. Spon read out loud the contents of the Sutton charge naming National Steel, Weirton Steel and the JSC as respondents.

34. Mr. Spon then explained to those in attendance at the meeting that the EEOC had advised him of its "intent

to intervene and that accordingly, the formal consents to be made a plaintiff in this civil action were necessary."

35. Mr. Spon then read out loud from one of the documents thereafter filed with the Court and asked each person in attendance to raise his right hand and swear to the truthfulness of the document.

36. The instant action was not commenced until on or about February 3, 1984 and, thus, on December 14, 1983 no ADEA action commenced by any of the plaintiffs was then pending.

37. Subsequent to December 14, 1983, the EEOC formally notified plaintiffs' attorneys that it would not intervene in the instant action.

38. *Ultimate Finding:* The documents filed with the Court by plaintiffs' attorneys were obtained by Mr. Spon upon his request. They are not consents by each signatory to become a party plaintiff in the instant action. Instead, they are consents by each signatory to be a party plaintiff in an action in which the EEOC is a party. The documents were executed by the signatories upon the representation of Mr. Spon—which has subsequently been established to have been inaccurate—that the EEOC was going to intervene in an ADEA action commenced by plaintiffs.

CONCLUSIONS OF LAW

I. Introductory Conclusions

1. This Court has jurisdiction of this action pursuant to 28 U.S.C. § 1331.

2. This Court has jurisdiction over the parties.

3. This action may be brought in this district pursuant to 28 U.S.C. § 1391.

4. Inasmuch as plaintiffs do not assert any claim for relief against the JSC or the ISU, the complaint should be, and the same hereby is, dismissed as against those defendants.

II. Each Plaintiff In An ADEA Action Must File A Charge With The EEOC As A Prerequisite To The Commencement Of An Action

5. The purpose of the ADEA is to prevent age discrimination, both in the hiring and discharging of employees. To sustain a claim under the ADEA, a plaintiff must establish that he was adversely affected individually by an employment decision. *See generally United Air Lines v. McMann,* 434 U.S. 192 (1977); *Lovelace v. Sherwin-Williams Co.,* 681 F.2d 230 (4th Cir. 1982).

6. Section 7(d) of the ADEA, 29 U.S.C. § 626(d), provides that no civil action may be commenced under the ADEA until 60 days after a charge alleging unlawful discrimination has been filed by the plaintiff with the EEOC. Inasmuch as a plaintiff in an ADEA action must establish that he was adversely affected by an employment decision, each plaintiff must file an individual charge with the EEOC as a prerequisite to commencement of an ADEA action. *Mitchell v. United States Steel Corp.,* 33 Empl. Prac. Dec. (CCH) ¶ 34,103 (N.D. Ala. 1984); *Price v. Maryland Casualty Co.,* 62 F.R.D. 614 (S.D. Miss. 1975), *aff'd,* 561 F.2d 609 (5th Cir. 1977).

7. Section 7(b) of the ADEA, 29 U.S.C. § 626(b), provides that the ADEA shall be enforced in accordance with the powers, remedies and procedures provided in Sections 211(b), 216 (except subsection (a)) and 217 of the Fair Labor Standards Act (the "FLSA"), 29 U.S.C. §§ 201, *et seq.*

8. Pursuant to Section 16(b) of the FLSA, 29 U.S.C. § 216(b), the only form of representative action authorized under the FLSA is an "opt-in" action, in which all aggrieved persons must file a consent to be a party plaintiff. Unlike Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-17, which permits maintenance of "opt-out" class actions under Rule 23 of the Federal Rules of Civil Procedure, the ADEA, through the FLSA, permits only "opt-in" class actions. *LaChapelle v. Owens-Illinois, Inc.*, 513 F.2d 286 (5th Cir. 1975).

9. Accordingly, the "single-filing" rule sometimes applied in actions brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-17, which rule permits a representative plaintiff to bring a class action on behalf of individuals who did not file a charge with the EEOC, is inapplicable to actions brought under the ADEA.

10. In light of Findings of Fact Nos. 14 through 28, all plaintiffs except Sutton have failed to satisfy Section 7(d) of the ADEA, 29 U.S.C. § 626(d), by each filing a charge with the EEOC and, therefore, the complaint should be, and the same hereby is, dismissed as against each plaintiff except Sutton.

11. At the very least, any charge purporting to be filed with EEOC on behalf of employees in addition to the employee filing the charge must state that the charging party is authorized by the additional employees to file a charge on their behalf. *Pirone v. Home Insurance Co.*, 507 F. Supp. 1281 (S.D.N.Y. 1981), *aff'd without opinion*, 742 F.2d 1430 (2d Cir. 1983).

12. In light of Findings of Fact Nos. 14 through 21 & 26, the two charges filed by Sutton were insufficient to

constitute a representative charge filed on behalf of employees other than Sutton.

13. As to Sutton, a plaintiff in an ADEA action who has previously filed a charge with the EEOC can assert in his complaint only the claim or claims of unlawful discrimination set forth in his EEOC charge. If a plaintiff includes a claim of unlawful discrimination in his complaint filed in an ADEA action which was not set forth in his EEOC charge, any such claim should be dismissed. *Cheng v. GAF Corp.*, 566 F. Supp. 350 (S.D.N.Y. 1982), *rev'd on other grounds*, 713 F.2d 886 (2d Cir. 1983).

14. In light of Findings of Fact Nos. 16 & 17, Counts III and IV of the complaint should be, and the same hereby are, dismissed as against Sutton.

III. The Documents Styled "Authorization and Consent" Filed With The Court By Plaintiffs' Attorneys Are Ineffective

15. Section 16(b) of the FLSA, 29 U.S.C. § 216(b), applicable in ADEA actions through Section 7(b) of the ADEA, 29 U.S.C. § 626(b), provides that no employee shall be a party plaintiff under the FLSA unless he gives his consent in writing to become a party plaintiff. *LaChapelle v. Owens-Illinois, Inc., supra*, 513 F.2d 286.

16. In light of Findings of Fact Nos. 26, and 29 through 38, it is not clear that plaintiffs other than Sutton authorized inclusion of their names as party plaintiffs in the caption of this action and, therefore, under these circumstances each plaintiff must file a consent with this Court evidencing his or her intent to be bound by any judgment rendered by this Court.

17. In light of Findings of Fact Nos. 29 through 38, the documents styled "Authorization and Consent" filed with the Court by plaintiffs' attorneys are ineffective, inasmuch as the signatories to those documents do not purport to consent to becoming party plaintiffs in the instant action, but instead, to becoming party plaintiffs in an action in which the EEOC is a party, which it is not in the instant action.

18. It is impermissible for counsel to solicit consents of prospective class members in an opt-in class action under the ADEA. Solicited consents are void. *McKenna v. Champion International Corp.*, 747 F.2d 1211 (8th Cir. 1984); *Partlow v. Jewish Orphans' Home of Southern California, Inc.*, 645 F.2d 757 (9th Cir. 1981); *Baker v. Michie Co.*, 93 F.R.D. 494 (W.D. Va. 1982).

19. In light of Findings of Fact Nos. 33 through 38, the documents styled "Authorization and Consent" filed with the Court by plaintiffs' attorneys are void, inasmuch as they were solicited by plaintiffs' attorneys.

20. Consistent with these Findings of Fact and Conclusions of Law, the complaint in this action should be and the same hereby is dismissed as against all plaintiffs except Sutton, and, as to Sutton, Counts III and IV of the complaint should be, and the same hereby are, dismissed as against him.*

Dated this 31st day of January, 1986

/s/ ROBERT E. MAXWELL

U.S.D.J.

The Court has not addressed the motion made by Weirton Steel and the JSC pursuant to Rule 11 of the Federal Rules of Civil Procedure relating to the statements made by Mr. Spon in his affidavit submitted before Judge Dumbauld in the Western District of Pennsylvania in opposition to defendants' motion to dismiss or transfer this action to this district. That motion remains pending for adjudication.

Appendix F

IN THE

United States District Court

FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

EDWARD DHAYER, *et al.*,
Plaintiffs,

vs.

NATIONAL INTERGROUP, INC., *et al.*,
Defendants.

Civil Action No. 84-100W
STIPULATION AND ORDER

IT IS HEREBY STIPULATED AND AGREED, by and among the undersigned attorneys, that whereas the issues with respect to whether the plaintiffs in this action have satisfied the procedural prerequisites for commencement of an action under the Age Discrimination in Employment Act, 29 U.S.C. §§ 621, *et seq.*, are the same as the issues decided by this Court in *Sutton, et al. v. National Intergroup, et al. (Civ. Action No. 84-74W) ("Sutton")* at a pretrial conference held in that action on October 29, 1985, this Court's Order in *Sutton* should be, and the same hereby is, deemed applicable to this action and, accordingly: (1) the Weirton Joint Study Committee should be, and the same hereby is, dismissed as a defendant; (2) the complaint in this action should be, and the same hereby is, dismissed in its entirety as against all plaintiffs except Edward Dhayer; and (3) as to Edward Dhayer, Counts III and IV of the complaint should be, and the same hereby are, dismissed. To the extent that this Court's order in *Sutton* is subsequently modified in any way favorable to the plaintiffs in that

action, this Stipulation and Order shall not preclude plaintiffs from making an application to this Court for a similar modification of this Stipulation and Order.

Dated: Weirton, West Virginia
January , 1986

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SO ORDERED this 31st day of
January, 1986

. . . . . /s/ ROBERT E. MAXWELL . . . . . .
U.S.D.J.

Appendix G

IN THE

United States District Court

FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

EUGENE R. SUTTON, *et al.*,
Plaintiffs,

vs.

NATIONAL INTERGROUP, INC., *et al.*,
Defendants.

Civil Action 84-74-W

EDWARD DHAYER, *et al.*,
Plaintiffs,

vs.

NATIONAL INTERGROUP, INC., *et al.*,
Defendants.

Civil Action 84-100-W

JOINT NOTICE OF APPEAL

Notice is hereby given that Eugene R. Sutton, et al., and Edward Dhayer, et al., Plaintiffs above named, hereby appeal to the United States Court of Appeals for the Fourth Circuit from the Order dated January 4, 1989 and entered on January 5, 1989 by United States District Judge Robert E. Maxwell entering final judgment as to the Plaintiffs and claims adjudicated in the Order of January 31, 1986 in which the Complaint in this action was dismissed against all Plaintiffs except Sutton, and, as to Sutton, Count III and IV of the Complaint were dismissed against him. In the Stipulation and Order entered on February 4, 1986, Edward Dhayer, et al., and National Intergroup, Inc.,

et al., agreed that the Court's Order in *Sutton* would be deemed applicable to this action. See Exhibit "A" attached hereto.

In support of Plaintiff's Notice of Appeal, Plaintiffs set forth the following:

1. These cases involved two (2) groups of Plaintiffs totalling 149 Plaintiffs who allege that Defendants violated the Age Discrimination in Employment Act (the "ADEA"), 29 U.S.C. Sec. 621 *et seq.* in that certain terms and conditions of the sale by National Steel of the assets of the Weirton Division to the Weirton Steel Corporation deprived them of pension, severance and other benefits to which they were entitled upon the sale.

2. In dismissing all Plaintiffs except Mr. Sutton, this Court held that the "single-filing" rule is inapplicable to ADEA actions and Mr. Sutton could not file a charge on behalf of all other Plaintiffs.

3. Various Circuit Courts have held different views on the "single-filing" rule.

4. In the present case, this Court's Order of January 31, 1986, resulted in the dismissal of over 98% of the *Sutton* and *Dhayer* Plaintiffs. Only a very small portion of the original case remains. Moreover, these Plaintiffs were

dismissed because this Court determined that the procedural requirements prerequisite to commencement of an ADEA action were not met.

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IN THE

United States District Court

FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

EUGENE R. SUTTON, *et al.*,
Plaintiffs,

vs.

NATIONAL INTERGROUP, INC., *et al.*,
Defendants.

Civil Action 84-74-W

EDWARD DHAYER, *et al.*,
Plaintiffs,

vs.

NATIONAL INTERGROUP, INC., *et al.*,
Defendants.

Civil Action 84-100-W

MEMORANDUM OPINION

These cases involve two (2) groups of Plaintiffs who allege that Defendants violated the Age Discrimination In Employment Act (the "ADEA"), 29 U.S.C. §§621, *et seq.*, in that certain terms and conditions of the sale by National Steel of the assets of the Weirton Division to the Weirton Steel Corporation deprived them of pension, severance and other benefits to which they were entitled upon the sale.

On October 30, 1984, this Court held a pretrial conference, at which conference the Court asked counsel for all parties to address certain issues with respect to whether the Plaintiffs had satisfied the procedural prerequisites to commencement of an action under the ADEA. In response,

both parties submitted various briefs, memoranda and affidavits.

On January 31, 1986, this Court dismissed the *Sutton* Complaint (Civil Action No. 84-74-W) as against all Plaintiffs except Eugene Sutton, and as to Mr. Sutton dismissed Counts III and IV. By stipulation, this Court's Order was deemed applicable to the *Dhayer* Complaint (Civil Action No. 84-100-W) and the Complaint was dismissed as to all Plaintiffs except Edward Dhayer. In dismissing all Plaintiffs except Mr. Sutton, this Court held that the "single-filing" rule is inapplicable to ADEA actions and Mr. Sutton could not file a charge on behalf of all other Plaintiffs.

This Court's Opinion and Order of January 31, 1986, did not expressly direct the Entry of Judgment against the Plaintiffs who were dismissed. In addition, this Court did not make the determination that there was no just reason for delay.

However, on March 5, 1986, the *Sutton* and *Dhayer* Plaintiffs appealed to the Court of Appeals for the Fourth Circuit. On August 1, 1986, the Court of Appeals dismissed Plaintiffs' appeals on the grounds that the January 31, 1986 Order of this Court had not been certified pursuant to Rule 54(b). On October 29, 1986, Plaintiffs filed with this Court a Motion requesting that this Court certify its Order of January 31, 1986. A memorandum in support of Plaintiffs' Motion was submitted on March 27, 1987. Each of the Defendants filed memoranda in opposition to Plaintiffs' Motions for Rule 54(b) certification.

Rule 56(b) of the Federal Rules of Civil Procedure states in pertinent part:

> "JUDGMENT UPON MULTIPLE CLAIMS OR INVOLVING MULTIPLE PARTIES. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, crossclaim, or third-party claim or when multiple parties are involved, the Court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. . . "

The *Sutton* case is a multiple party action with over 171 Plaintiffs. On January 31, 1986, this Court dismissed 170 Plaintiffs from the case. Thus, this Court's Order of January 31, 1986 clearly places the dismissed Plaintiffs within the parameters of Rule 54(b).

Whether or not the claims of these Plaintiffs will be certified is "left to the sound discretion of the district court." *Curtiss-Wright Corp. v. General Electric Co.*, 446 U.S. 1,100 S. Ct. 1460, 64 L. Ed. 2d 1 (1980). The district court is the one most likely to be familiar with the case and with any justifiable reasons for delay.

In the present case, this Court's Order of January 31, 1986, resulted in the dismissal of over 98% of the *Sutton* and *Dhayer* Plaintiffs. Only a very small portion of the original case remains. Moreover, these Plaintiffs were dismissed because this Court determined that the procedural requirements prerequisite to commencement of an ADEA action were not met. As such, if any immediate appeal is taken by these dismissed Plaintiffs, there is no danger that an appellate court would have to decide the same issue more than once even if these were subsequent appeals by Messrs. Sutton and Dhayer.

In *Curtiss-Wright Corp. v. General Electric Co., supra,* the United States Supreme Court stated that an important consideration in a Rule 54(b) analysis whether the nature of the claims already determined is such that no appellate court would have to decide the same issue more than once in subsequent appeals.

In addition, it is this Court's belief that certification of these claims makes "judicial sense." If an immediate appeal is not allowed by this Court, then the issue of whether Plaintiffs complied with the procedural prerequisites will reach the Court of Appeals after the trials of Mr. Sutton and Mr. Dhayer. If the appellate court then rules that this Court improperly dismissed all Plaintiffs except Mr. Sutton and Mr. Dhayer, this Court will be faced with conducting a second trial involving the same issues and an identical presentation of evidence by both Plaintiffs and Defendants.

It is this Court's opinion that certification of its January 31, 1986 Order will avoid a situation that may spawn two trials of the exact same issues. In addition, there is no possibility of repetitive appellate review of the same issues.

Accordingly, this Court concludes that there is no just reasons to delay appeal of the January 31, 1986 Order dismissing the claims of all Plaintiffs except Mr. Sutton and Mr. Dhayer. The Plaintiffs' Motion for Entry of Final Judgment under Rule 54(b) will be granted.

January 4, 1989

/s/ ROBERT E. MAXWELL
United States District Judge

IN THE

United States District Court

FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

EUGENE R. SUTTON, *et al.*, *Plaintiffs,* vs. NATIONAL INTERGROUP, INC., *et al.*, *Defendants.*	**Civil Action 84-74-W**
EDWARD DHAYER, *et al.*, *Plaintiffs,* vs. NATIONAL INTERGROUP, INC., *et al.*, *Defendants.*	**Civil Action 84-100-W**

ORDER DIRECTING ENTRY OF FINAL JUDGMENT AS TO CERTAIN PLAINTIFFS AND CLAIMS AND DETERMINATION THAT NO JUST CAUSE EXISTS FOR DELAY PURSUANT TO RULE 54(b) OF THE FEDERAL RULES OF CIVIL PROCEDURE

Plaintiffs, Eugene R. Sutton, et al., and Edward Dhayer, et al., have filed a Motion Requesting Entry of Final Judgment as to certain Plaintiffs and claims adjudicated in the prior Order of this Court entered January 31, 1986 and filed February 4, 1986, and a determination that there is no just cause for delay in entering final judgment with respect to the Plaintiffs and claims adjudicated pursuant to Rule 54(b) of the Federal Rules of Civil Procedure.

Upon consideration of the Motion of Plaintiffs, it is expressly determined that there is no just cause to delay the Entry of Final Judgment as to the Plaintiffs and claims adjudicted in the Order of January 31, 1986 and it is

ORDERED that final judgment be and hereby is entered.

Entered: January 4, 1989 /s/ ROBERT E. MAXWELL
United States District Judge

IN THE

United States District Court

FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

EUGENE R. SUTTON, *et al.*,
Plaintiffs,

vs.

NATIONAL INTERGROUP, INC., *et al.*,
Defendants.

Civil Action 84-74-W

EDWARD DHAYER, *et al.*,
Plaintiffs,

vs.

NATIONAL INTERGROUP, INC., *et al.*,
Defendants.

Civil Action 84-100-W

CERTIFICATE OF MAILING

I, Shelley W. Elovitz, certify that on this 30th day of January, 1989, I served the foregoing Notice of Appeal upon all counsel of record.

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..../s/ SHELLEY W. ELOVITZ.....
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